24-0514

IN THE

SUPREME COURT OF THE UNITED STATES

McMILLAN, DOVE,
Petitioner,

v.

BOARD OF REGENTS OF
CITY UNIVERSITY OF
LANTANA,
Respondent.

ON PETITION FOR WRIT OF
CERTIORARI TO
THE UNITED STATES COURT OF
APPEALS FOR THE THIRTEENTH
CIRCUIT

BRIEF FOR RESPONDENT

TEAM NUMBER 34
Counsel for Respondent

QUESTIONS PRESENTED

1. When the District Court materially revised its final judgment to include a $350,000 punitive damages award, did the amended judgment reset the twenty-eight-day period for filing a renewed motion for summary judgment as a matter of law challenging liability?
2. Does The City University of Lantana comply with the First Amendment by adopting a viewpoint-neutral policy of not disciplining students who interfere, as private parties, with another person's ability to speak on campus?

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STATEMENT OF THE CASE

I. STATEMENT OF FACTS

The City University of Lantana ("the University") is a public university in New Tejas. R. at 2a. Founded in 1849, the University has a long history of academic excellence, civic engagement, and leadership in a variety of academic fields. R. at 2a. Student engagement is encouraged, as evidenced by the University's thriving athletic program and over 60 student organizations that represent a spectrum of arts, culture, political, gender and sexuality, religious, and social action groups. R. at 3a.

In the mid-2000s, the University hired Mason Thatcher, a University alumnus and former National Football League player, to serve as the University's Dean of Student Affairs. R. at 4a. Although he lacked traditional experience for the role at the time of his hire, Thatcher "appears to have been quite successful" in the nearly two decades that he has served in the position. R. at 4a. As Dean, Thatcher is responsible for overseeing student life on campus, facilitating some fundraising for the University, and overseeing student discipline. R. at 4a. Under Thatcher's administration, students who act out are given "a good talking to, not any kind of 'punishment,'" based on Thatcher's philosophy that even if things "get out of hand every now and then," the students "work hard" and "just need to blow off a little steam." R. at 5a. Thatcher has applied this disciplinary approach for the nearly two decades of his tenure, and campus security and fellow employees in the Department of Student Affairs have complied. R. at 5a.

In keeping with this approach, the University, under Thatcher's leadership, has adopted a policy of non-intervention during campus events that invite protest. As a "preeminent educational institution," the University attracts students with a variety of beliefs. As a result, speaking events on an array of subjects have attracted student dissent. R. at 2a, 5a. Reflecting the diversity of opinions on campus, groups of protesters have attended events on subjects as varied as institutional racism, Second Amendment rights, recreational marijuana use, and climate change. R. at 5a. At each of these events, protesters shouted while the presenter attempted to speak, and in each instance campus security followed the University's non-intervention policy and did not intervene to silence the speaker or the protesters. R. at 5a. None of the protest activities were violent or threatened imminent violence. R. at 5a.

On February 7, 2020, Dove McMillan ("Petitioner"), a well-known vegan advocate who was invited to speak on campus by the Campus Vegan Alliance, arrived in Lantana and attended a private dinner hosted by a member of the group. R. at 6a. The next day, Petitioner attempted to give a speech in the campus auditorium. After speaking for five minutes uninterrupted, student protesters gathered near the foot of the auditorium stage and began making noise. R. at 6a. Student protesters carried banners, used various noisemakers, and wore animal costumes. R. at 6a. Despite requests from Petitioner and other students to stop, the students continued to protest. R. at 6a. At no point did the protesters act violently towards Petitioner or other students in the audience, nor did they come closer to

Petitioner than their position at the foot of the stage. R. at 6a. A member of campus security was present, but did not engage with the protesters or Petitioner. R. at 7a. After about fifteen minutes, Petitioner voluntarily left the stage and did not return. R. at 6a. The protesters stayed in the auditorium for around an hour before voluntarily dispersing. R. at 6a. Although some minor property damage occurred, Petitioner does not allege that this took place while she was on stage. R. at 6a. After the protesters dispersed, Petitioner chose not to return to the stage and did not resume her speech. R. at 6a.

In accordance with the University's policy of non-intervention and its viewpoint-neutral stance towards speaking events, the University did not discipline any of the protesting students during the event or after. R. at 7a. This decision comported with the University's consistent approach of non-intervention during campus events that draw protest, regardless of the speakers' and protesters' ideological viewpoints.

II. PROCEDURAL HISTORY

Petitioner sued the University in the United States District Court for the Eastern District of New Tejas. The matter was tried before a jury in January 2022. At trial, the University moved for summary judgment as a matter of law under Federal Rule of Civil Procedure 50(b). The Jury returned a verdict in favor of Petitioner on January 20, 2022, awarding $12,487 in compensatory damages and $350,000 in punitive damages. That same day, the District Court entered its final

judgment on the verdict and awarded the $12,487 compensatory damages award. The judgment, however, did not include the punitive damages award.

One week later, on January 27, 2022, the District Court materially amended its final judgment. It entered an amended final judgment, which was identical to the original one but added the $350,000 punitive damages award. Twenty-eight days later, the University renewed its motion for summary judgment as a matter of law under Rule 50(b). This renewed arguments the University had properly raised under Rule 50(a) challenging its liability. The parties agree that the arguments the University renewed were properly raised in its Rule 50(a) motion at trial.

The District Court found that the renewed motion for summary judgment as a matter of law was not timely filed and dismissed it accordingly. In dismissing the suit, the District Court declined to address the merits of the case. The University appealed the decision to the United States Court of Appeals for the Thirteenth Circuit, which reversed the District Court's finding as to the timeliness issue and granted the renewed motion for summary judgment as a matter of law on the merits. In so granting the renewed motion for summary judgment, the Court of Appeals also found that no cause of action existed on the First Amendment merits question. Petitioner sought review in this court, which granted certiorari.

SUMMARY OF THE ARGUMENT

The University's renewed motion for summary judgment as a matter of law was timely filed. Federal Rule of Civil Procedure 50(b) provides that litigants must file such a motion within twenty-eight days of a final judgment. In this case, the

District Court entered its amended final judgment on January 27, 2022, and the University filed its motion exactly twenty-eight days later, on February 24, 2022. The District Court erred in finding the University's filing untimely because it treated the date of the original judgment as the beginning of the twenty-eight-day clock. But when a court materially revises a final judgment such that it affects the parties' legal rights and obligations, it resets the clock. The correct date for measuring the filing deadline was therefore January 27, 2022, making the University's filing on February 24, 2022, timely.

On the merits, the Petitioner has no cause of action to pursue a claim that the University violated Petitioner's First Amendment rights by failing to discipline protesters for interfering with her speech.[1] Public universities are state actors and therefore have no affirmative duty to prevent private actors, including student protesters, from interfering with the constitutional rights of others. By adopting a viewpoint-neutral policy towards speakers and their ideas, the University cannot be said to have had an affirmative role in suppressing Petitioner's speech because it did not impermissibly preference one view over another. If the University had intervened to discipline the protesters, the University would have abandoned its viewpoint-neutral policy and violated the constitutional rights of its students.

[1] Petitioner's suit against the University arises under 42 U.S.C. § 1983, which provides a cause of action against state officials who, "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory" causes a "deprivation of any rights, privileges or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. Petitioner claims that the University's "custom" of failing to intervene and prevent protesters from disrupting her speech violated her First Amendment right to speak. R. at 11a. For the purposes of the suit, both parties agree that the University constitutes a municipality, which can be sued under § 1983 for adherence to policies or customs that allegedly create unconstitutional outcomes. Monell v. Dep't of Soc. Services of City of New York, 436 U.S. 648, 690 (1978).

Therefore, the University's policy of non-intervention not only did not violate Petitioner's First Amendment rights, but also prevented the violation of the constitutional rights of the protesters.

ARGUMENT

This Court should affirm the Thirteenth Circuit's holding that (1) the University's renewed motion for summary judgment was timely filed and (2) no cause of action asserting a violation of the First Amendment exists. Public universities do not violate the First Amendment by failing to protect an individual's constitutional rights from private interference in accordance with a viewpoint-neutral policy of non-intervention.

I. THE UNIVERSITY'S MOTION WAS TIMELY FILED.

The University's renewed motion for summary judgment as a matter of law was timely filed. Rule 50(b) provides that a movant has twenty-eight days "after the entry of judgment" to renew a motion for summary judgment as a matter of law. Fed. R. Civ. P. 50(b). The University filed its motion on February 24, 2022, exactly twenty-eight days after the District Court entered an amended final judgment on January 27. Petitioner nonetheless contends that the University's motion was not timely because the District Court issued a final judgment order inadvertently granting the incorrect relief on January 20, thirty-five days before the University's motion. Petitioner asks this court to hold that the twenty-eight-day clock runs from the original, incorrect judgment, rather than the amended one, even though the amended judgment materially revised the original. Petitioner's theory is untenable

and inconsistent not only with applicable precedent, but also with basic principles of notice, fairness, and the administration of justice.

A. Material Changes to a Final Judgment Reset the Twenty-Eight-Day Clock.

A material change to a final judgment resets the twenty-eight-day clock for filing a renewed motion for summary judgment as a matter of law. For decades, this Court has endorsed this practical rule in the context of deadlines for appeal. In Fed. Trade Comm'n v. Minneapolis-Honeywell Regul. Co., this Court held that "when the lower court changes matters of substance . . . in a judgment previously rendered . . . the period within which an appeal must be taken . . . begin[s] to run anew." 344 U.S. 206, 211-12 (1952). While Honeywell arose in the context of filing deadlines to appeal an amended judgment, its rationale should apply with equal force in the context of filing deadlines to renew a motion for summary judgment as a matter of law challenging an amended final judgment. An appeal and a renewed motion for summary judgment both seek a revision of the final judgment, and therefore this Court should apply the same practical test in both contexts.

Applying Honeywell requires the Court to distinguish between material revisions to final judgments and immaterial ones. If a district court revises a final judgment in an immaterial way, such as correcting a clerical error or altering only a collateral issue, then it does not toll the time in which the aggrieved party must file their appeal or renew their motion for summary judgment as a matter of law. See Sammons v. McCarthy, No. 22-1642, 2023 WL 3002738, at *2 (4th Cir. Apr. 19, 2023); Progressive Indus., Inc. v. United States, 888 F.3d 1248, 1253 (Fed. Cir.

2018). "The key question is whether changes to an amended order 'disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality.'" Robinson v. Sherman Fin. Grp., LLC, 611 F. App'x 300, 301-02 (6th Cir. 2015) (quoting Honeywell).

The parties agree here that the District Court's revisions did not involve a mere collateral issue or clerical error. R. at 18a. Whereas the initial judgment awarded to Petitioner $12,487 in total, the amended judgment awarded an additional $350,000 in punitive damages, increasing the University's liability to Petitioner by nearly thirty times the amount of the initial award. This was a substantial change that could reasonably affect the University's decision as to whether to renew a motion for summary judgment as a matter of law. Therefore, under Honeywell, the University's twenty-eight-day clock began on the day of the amended final judgment. See also Hipple v. SCIX, LLC, 778 F. App'x 119, 121 (3d Cir. 2019) (applying Honeywell's practical test "from the perspective of a reasonable litigant").

B. The Twenty-Eight-Day Clock for Challenging Liability Runs from an Amended Judgment, Even When the District Court only Revised the Damages Amount.

Nonetheless, Petitioner asks this court to create an exception to Honeywell. They ask this court to hold that when an amended judgment materially revises the damages award, the filing date for challenging liability does not reset. In their view, a party in the University's position—whose monetary exposure expanded by an order of nearly thirty times its original amount—is stuck with a substantially

shorter time period to determine whether and on what grounds to challenge the new and substantially different final judgment, just because the district court entered an erroneous final judgment in the first instance. This result is untenable, and yet it finds support in decisions of the Second and Seventh Circuit. See Tru-Art Sign Co. v. Loc. 137 Sheet Metal Workers Int'l Ass'n, 852 F.3d 217, 221 (2d Cir. 2017) ("When both an initial judgment and an amended judgment exist, the timeliness of a . . . motion [challenging the amended judgment] is determined from the date of the amended judgment only if the motion bears some relationship to the district court's alteration of the first judgment."); McNabola v. Chicago Transit Auth., 10 F.3d 501, 521 (7th Cir. 1993) (holding that a motion challenging an amended judgment is only timely if filed within the filing period for the amended judgment but not the original judgment if the motion bears "some relationship to the district court's alteration of the first judgment—that is, the motion must challenge the altered and not the original judgment"). These decisions should be overturned because the underlying rationale they rely on is unpersuasive and the rule they create adds unnecessary complexity for litigants. The Honeywell rule should apply straightforwardly and without exception on its own terms.

i. Tru-Art and McNabola Should Be Overturned Because the Rationale Supporting Them Is Unpersuasive.

The exception to Honeywell invented by the Second and Seventh Circuits has no basis in the text of the Federal Rules of Civil Procedure, or in this Court's precedents. Instead, those decisions are based only on a thin and unpersuasive policy rationale: "the time limit [for challenging an amended final judgment] would

be ineffective if parties could continually file motions unrelated to the basis for the new judgment, thereby preventing the judgment from becoming final." Tru-Art, 852 F.3d 217 at 222; see also McNabola, 10 F.3d at 521 ("The time limit would be a joke if parties could continually file new motions, preventing the judgment from becoming final.") (internal quotations omitted). The Tru-Art and McNabola courts are essentially concerned that if every material revision to a judgment could re-open the door for parties to challenge any of the grounds for the judgment, then the judgment would be open to endless attack, undermining its finality.

But this concern overlooks one critical consideration: under the Honeywell rule, a litigant would only be able to endlessly continue to raise new challenges to a judgment if the district court endlessly continued to make material revisions to it. In other words, the number of times the twenty-eight-day clock for challenging a judgment resets is directly tied to the number of times the district court materially revises the original judgment. Making a material revision to a judgment is entirely within the power and discretion of the district court, so it would be inconsistent with the fair administration of justice to force litigants to bear the burden of a truncated filing period to serve the policy interest of quickly achieving finality in the litigation.

In this case, the District Court only made one material revision to the judgment on January 27, 2022. That was the only time the twenty-eight-day clock was reset. Thus, the time limit for the University to renew its motion for summary judgment as a matter of law was not unlimited. Counting from the date of the

January 27 amended judgment, the University had until February 24 at the latest to file their motion. They filed by February 24, so the motion was timely.

ii. Tru-Art and McNabola Should Be Overturned Because They Add Unnecessary Complexity to Determining the Applicable Filing Date.

There is another very practical reason this Court should not adopt the Second and Seventh Circuit's exception: if the timeliness of a renewed motion for summary judgment turns on the substance of the arguments raised, rather than the date of the most recent judgment, the timeliness analysis is converted from a simple day-counting process into an analysis of the merits of the motion. That makes the test more difficult for courts to apply consistently, and the filing date more difficult for litigants to know prospectively.

To illustrate this point, consider the position the University found itself in after the District Court materially revised its final judgment. In amending the judgment to add an additional $350,000 punitive damages award, the District Court altered the University's legal obligations in a material way, and thus under the Honeywell test the University could know it had 28 days from the date of the amended judgment to file a renewed motion for summary judgment. But if the University must also assure itself that the arguments it raises in its motion remain responsive only to the change between the judgments, and must not address any aspect of the judgment that remained constant across the two versions, then the University must prospectively determine and compare the permissible scope of a motion they could make running from the original judgment versus the amended one *and then* determine which filing date applies to which sets of arguments

raisable in either motion. Even though the issues raisable on account of either theory may be interrelated or involve overlapping and competing strategic considerations, the University would be forced to decide how to respond to the amended judgment on an accelerated timeline or waive their ability to renew a motion for summary judgment that challenges the original liability determination. This adds needless complication. Filing deadlines should be prospectively knowable for litigants to a high degree of certainty. The Honeywell rule keeps things simple and predictable, and this Court should not disturb that.

Petitioner's argument should also be rejected because Tru-Art and McNabola misconstrue the practical considerations litigants seeking to renew a motion for summary judgment tend to actually make. The logic of Tru-Art and McNabola applied to this case would go something like this: when the University learned on January 20, 2022, that it was found liable, the twenty-eight-day clock for renewing a motion for summary judgment began. And, on Petitioner's theory, because only damages were later adjusted, the twenty-eight-day clock continued to run from the original finding of liability. It follows from the Tru-Art and McNabola theory that because the University lost on the liability issue on January 20, and then waited thirty-five days to challenge liability even though the original liability finding was never revised, the University missed the deadline. But this theory discounts the relationship between a substantially increased damages award and the decision to challenge liability. When the University originally learned that they owed $12,487 in damages, the University may have been wise to opt not to challenge liability even

if it believed it was not liable, so as to avoid incurring further litigation expenses. But when the damages jumped to $362,487, that calculation may have changed entirely, and for good reason. It may be wise for a litigant to change its decision as to whether to attack liability when its monetary exposure for liability changes dramatically, as happened here. Therefore, the effect of a material increase in monetary exposure should have the same effect on the filing date as a material revision to the liability determination. See Linin v. Neff, No. 17-4158, 2019 WL 13213358, at *3-4 (10th Cir. Feb. 5, 2019) (holding that when a clarifying order "expand[s] the consequences" of the original order, it is a material revision for purposes of applying the Honeywell test). McNabola and Tru-Art should therefore be overturned and the Honeywell test should apply here, rendering the University's renewed motion for summary judgment timely.

II. PUBLIC UNIVERSITIES DO NOT VIOLATE THE FIRST AMENDMENT BY REFUSING TO DISCIPLINE STUDENTS WHO INTERFERE WITH SPEAKERS ON CAMPUS IN ACCORDANCE WITH A VIEWPOINT-NEUTRAL POLICY.

The United States Court of Appeals for the Thirteenth Circuit properly held that the University's failure to prevent private individuals from interfering with Petitioner's speech did not violate the First Amendment, and therefore no cause of action exists. R. at 14a. The First Amendment protects citizens against government interference in one's rights of expression. Thornhill v. State of Alabama, 310 U.S. 88, 95 (1940) ("The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent

punishment [by the government]."). The First Amendment does not require the government to ensure a balanced presentation of competing views or impose an obligation on the government to prevent private individuals from violating another's constitutional rights. Pahls v. Thomas, 718 F.3d 1210, 1241 (10th Cir. 2013) (finding that the government is not constitutionally required to ensure a "balanced presentation of competing views"); DeShaney v. Winnebago Cnty. Dep't. of Soc. Servs., 489 U.S. 189, 195 (1989) (holding that state actors have no constitutional obligation to prevent private interference with an individual's rights).

A viewpoint-neutral stance of non-intervention prevents the University from prioritizing one set of views over another, which would constitute viewpoint-discrimination and would be per se unconstitutional. Pahls, 718 F.3d at 1229. Because the University never affirmatively curtailed or amplified the speech of the speaker or the protesters, the University consistently applied its viewpoint-neutral policy and effectuated no constitutional violation.

A. State Actors Have No Affirmative Duty to Prevent Private Actors from Interfering with the Constitutional Rights of Others.

The First Amendment imposes no affirmative duty on the State to prevent a private actor from interfering with another's constitutional rights. The First Amendment is incorporated against the states through the Fourteenth Amendment. Gitlow v. People of State of New York, 268 U.S. 652, 666 (1925). With incorporation, the Court ruled that the rights granted to the people in the First Amendment would be protected from infringement or abuse by state governments through the fundamental liberty interests enshrined in the Fourteenth Amendment. Id. (finding

that "freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States").

The text of the Fourteenth Amendment states that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV. The structure of the Fourteenth Amendment asserts negative rights—a "limitation on the State's power to act"—rather than positive rights, such as a "guarantee of certain minimal levels of safety and security." DeShaney, 489 U.S. at 195. In DeShaney, this Court made clear that the purpose of the Fourteenth Amendment is to "protect the people from the State, not to ensure that the State protected them [the people] from one another." Id. at 196 (holding that the State had no constitutional duty to protect a child from abuse perpetrated by his father, a private actor, because the Due Process Clause imposes no obligation on the government to protect against private violence). Thus, the State also has no affirmative duty to prevent private actors from infringing on an individual's due process rights. Id.

Similarly, the State has no affirmative duty to provide resources to assure that protected negative rights are universally accessible. In Maher v. Roe, the Court ruled that the Constitution imposes no obligation on the government to ensure that everyone has access to medical care through state subsidies, even if the Due Process Clause might forbid the government from imposing unconstitutional obstacles to

accessing care. 432 U.S. 464, 469 (1977); see also Harris v. McRae, 448 U.S. 297, 318 (1980) ("It cannot be that because government may not prohibit the use of contraceptives, or prevent parents from sending their child to private school, government, therefore, has an affirmative constitutional obligation to ensure that all persons have financial resources to obtain contraceptives or send their children to private schools.").

The First Amendment is structured similarly to the Fourteenth Amendment in that it also asserts negative rather than positive rights. The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech or of the press; or of the right of the people peaceably to assemble . . ." U.S. Const. Amend. I. Just as the Fourteenth Amendment is concerned with protecting people from the State rather than from private citizens, so too is the First Amendment. McGuire v. Reilly, 386 F.3d 45, 60 (1st Cir. 2004) ("The First Amendment is concerned with government interference, not private jousting in the speech marketplace."). By writing the First Amendment in the negative, the Framers were guarding against government restrictions on freedom of expression. Thornhill, 310 U.S. at 95. As both the First and Fourteenth Amendments protect people from the government through a grant of negative rights, "it stands to reason that a comparable claim [to the Fourteenth Amendment] to affirmative state protection for one's speech must fail." Kessler v. City of Charlottesville, 441 F.Supp.3d 277, 286 (W.D. Va. 2020), aff'd No. 20-1704, 2022 WL 17985704 (4th Cir. Dec. 29, 2022) (per curiam); see also Near v. State of Minnesota ex rel. Olson, 283 U.S. 697, 628 (1931)

("It is no longer open to doubt that the liberty of the press and of speech is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action.").

Mandel v. Board of Trustees of California State University, a case with similar facts to those at hand, is instructive on how courts refuse to impose an affirmative duty on universities to protect a speaker's First Amendment rights when private parties, such as students, disrupt speech. No. 17-CV-03511-WHO, 2018 WL 5458739 (N.D. Cal. Oct. 29, 2018). In Mandel, students who attended San Francisco State University, a public institution, sued the university through its Board of Trustees. Id. at *10. The students alleged that the university violated their First Amendment rights when it failed to prevent protesters from shutting down an event organized by a Jewish student group. Id. at *14. Soon after the speaker began talking, protesters started shouting "antagonizing and threatening" chants using sound amplification devices that caused the speaker to leave. Id. at *4. While acknowledging that the protesters were shouting remarks that could be considered offensive or threatening to the plaintiffs and speaker, the District Court nevertheless dismissed the complaint, finding that the State had no affirmative duty to prevent the student protesters, as private actors, from interfering with the speech. Id. at *14. A university's failure to intervene is not enough to support a claim that it "intentionally and actively fostered the conduct of the protesters." Id. See also Pinder v. Johnson, 54 F.3d 1169, 1176 (4th Cir. 1995) (cert denied) ("While it is true that inaction can often be artfully recharacterized as "action," courts

should resist the temptation to inject this alternative framework into omission cases by stretching the concept of 'affirmative acts' beyond the context of immediate interactions between the [government actor] and the plaintiff.").

Here, Petitioner's speech was curtailed by private individuals, not through affirmative actions taken by the University. R. at 6a. Like in Mandel, the student protesters shouted and used noisemakers to drown out Petitioner's attempts to talk. R. at 6a. However, shouting and the use of noisemakers by private parties does not impose a constitutional obligation on the State to protect Petitioner's ability to express herself. Felber v. Yudof, 851 F.Supp.2d 1182, 1186 (N.D. Cal. 2011) ("State actors have no constitutional obligation to prevent private actors from interfering with the constitutional rights of others."). In the absence of affirmative acts undertaken by the University to curtail Petitioner's speech, Petitioner's cause of action is best pursued against the private individuals who prevented her from speaking, not the University, which had no duty to intervene to protect one individual's First Amendment rights at the expense of others.

B. The University's Viewpoint-Neutral Policy Does Not Discriminate and Therefore Does Not Violate the First Amendment.

The University's policy of viewpoint neutrality does not violate the First Amendment because it does not impermissibly regulate or discriminate against one subset of views over another. A content-based regulation is one "based upon either the content or the subject matter of the speech." Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 536 (1980). Viewpoint discrimination is a "particularly egregious" subset of content-discrimination. Pahls, 718 F.3d at 1229

(citing Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995)). Viewpoint discrimination occurs when the government "targets not subject matter but particular views taken by speakers on a subject." Rosenberger, 515 U.S. at 829. Content and viewpoint-based policies are presumptively discriminatory and therefore invalid under the First Amendment. Pahls, 718 F.3d at 1229. On the other hand, a policy is considered neutral if it does not rest on the views or content of the speech. Id. The "government's purpose" in enacting a particular policy is the controlling consideration in distinguishing the two types of policies. Id. (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)). The University's policy of non-intervention for speakers and protesters was not adopted out of hostility to any particular viewpoint and did not target any specific view in practice. R. at 12a. ("There is no evidence of impermissible motive."). Therefore, the University's policy did not violate the First Amendment.

i. So Long as the University Maintains a Consistent Viewpoint-Neutral Policy, There Is No First Amendment Obligation to Ensure Balanced Presentations of Competing Views.

While the government must treat minority views with the same respect as majority views to maintain viewpoint-neutrality, incidental burdens on speech that might result in unequal speaking time do not per se violate the First Amendment. Pahls, 718 F.3d at 1241 ("[T]he First Amendment does not impose upon public officials an affirmative duty to ensure a balanced presentation of competing viewpoints."). To prove that a facially neutral policy is unconstitutional because it occasionally results in "differential impact among viewpoints," the plaintiff must

prove that the purpose of the law is discriminatory. Boy Scouts of America v. Wyman, 335 F.3d 89, 94 (2d Cir. 2003) (citing Madsen v. Women's Health Center, Inc., 512 U.S. 753, 754 (1994)).

In McGuire v. Reilly, the First Circuit upheld the constitutionality of a Massachusetts ordinance creating speech buffer zones outside abortion clinics because the legislative intent in creating the statute was content-neutral, even if its effects caused "one side of the abortion debate [to] suffer some incidental adverse effects or burdens." 386 F.3d 45, 63 (1st Cir. 2004). Absent a discriminatory legislative purpose, the only way that the adverse effects on one viewpoint would render the statute unconstitutional would be if the government "intentionally enforce[d] the statute unequally." Id. at 63. See also Ashcroft v. Iqbal, 556 U.S. 662, 676-77 (2009) ("[A claim of discrimination] involves a decisionmaker's undertaking a course of action 'because of,' not merely 'in spite of,' [the action's] adverse effects upon an identifiable group."). If government intentionality is not proven, evidence of inequality posited by the plaintiff "would merely indicate a disproportionate burden that would not signify viewpoint discrimination." McGuire, 386 F.3d at 63.

Riley v. National Federation of the Blind of North Carolina, Inc. asserts the idea that facial neutrality is not a sufficient defense if the effects of the policy result in the favoring of some views over others. 487 U.S. 781, 799 (1988). Riley, however, is distinguishable from the facts at issue here. In Riley, this Court held that a North Carolina law regulating the solicitation of charitable contributions was unconstitutional because it "necessarily discriminate[d] against small or unpopular

charities." Id. But Riley involved a direct government regulation of speech—specifically, a state law that compelled speech in the form of certain disclosures. Id. at 796. The law necessarily "encourage[d] some forms of solicitation and discourage[d] others." Id. at 789 n. 5.

Here, the University is compelling neither speech nor silence. The interference with Petitioner's ability to speak came from private action by students rather than by an official mandate that Petitioner leave the stage. The University adopted a viewpoint-neutral policy that does not rest on the views or content of the speech or speakers. This policy has been universally applied to all speakers brought to campus, regardless of political affiliation or viewpoint.[2] R. at 5a. At every event attracting protesters, campus security is present but does not intervene in accordance with the University's "hands-off policies." R. at 5a. The same viewpoint-neutral policy of inaction was adhered to when Petitioner spoke on campus, indicating "consisten[cy] and evenhanded[ness]" in the policy's enforcement. R. at 11a. The Court in Riley wrote that "[t]he First Amendment mandates the presumption that speakers, not the government, know best both what they want to say and how to say it." Id. at 782. The University respects this Court's assertion by imposing speech restrictions on neither the speakers who come to campus nor its students who wish to exercise their First Amendment right to protest.

ii. The Heckler's Veto Doctrine Does Not Apply Because the University Adopted and Enforced a Viewpoint-Neutral Policy of Non-Intervention.

[2] For example, protesters were present at an event where speakers presented on institutional racism, at an event discussing Second Amendment rights, and at an event where speakers discussed whether recreational marijuana should be legalized. R. at 5a.

The University's viewpoint-neutral policy and its adherence to said policy categorically foreclose the sanctioning of a heckler's veto and associated viewpoint discrimination. Under the heckler's veto doctrine, the government sanctions a violation of the First Amendment when "listeners react to speech based on its content and the government then ratifies that reaction by restricting the speech in response to listeners' objections." Ctr. for Bio-Ethical Reform, Inc. v. Los Angeles Cnty. Sheriff Dep't, 553 F.3d 780, 789 (9th Cir. 2008). The government's ratification of the listeners' objectives constitutes a content-based restriction that is unconstitutional. Id. See also Meinecke v. City of Seattle, 99 F.4th 514, 524 (9th Cir. 2024) (holding that the City of Seattle's attempt to relocate the speaker after a crowd gathered around the speaker yelling, and subsequent arrest of the speaker when he failed to move, constituted a heckler's veto on the speaker's "expressive activity because the City did so only in response to the actual and potential reaction of the audience"). However, no such content or viewpoint-based restriction occurs if a regulation or policy applies to *all* speech and is not arbitrarily enforced based on offensiveness or generalized disruption. Santa Monica Nativity Scenes Comm. v. City of Santa Monica, 784 F.3d 1286, 1294 (9th Cir. 2015).

A valid claim against the University for a heckler's veto would exist only if University officials had taken some affirmative action acquiescing to the demands of the crowd, such as requiring Petitioner to leave the stage. But at no point did University officials ask Petitioner to leave the stage or do anything that might have been construed as an affirmative act violative of Petitioner's First Amendment

rights. See Bible Believers v. Wayne County, Mich., 805 F.3d 228 (6th Cir. 2015) (holding that absent violence, the police cannot require a speaker to leave if they are otherwise exercising their lawful First Amendment rights, or the State would be effectuating a heckler's veto). Instead, Petitioner voluntarily left the stage due to the behavior of private actors and voluntarily chose not to return, even after the protesters had left the premises. R. at 6a.

C. Discipline of Protesters by the University Would Unconstitutionally Violate Protesters' First Amendment Rights.

Students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969). Attempting to discipline protesters who are permissibly exercising their First Amendment rights would constitute viewpoint discrimination against the student protesters. There is no hierarchy of First Amendment rights, and protesters have just as much a right to speak as Petitioner. See Beckerman v. City of Tupelo, Miss., 664 F.2d 502, 510 (5th Cir. 1981) ("A state may not keep law and order by depriving citizens of their rights.").

The location of the protest on the University campus and the fact that the protesters were students do not diminish the protesters' First Amendment rights. Healy v. James, 408 U.S. 169, 180 (1972) ("[S]tate colleges and universities are not enclaves immune from the sweep of the First Amendment."). To justify disruption of student expression, the school must be able to show that its "action was caused by something more than a mere desire to avoid . . . discomfort and unpleasantness." Tinker, 393 U.S. at 509 (finding that high school students had a First Amendment

right to express their opposition to the Vietnam War by wearing black armbands at school). Three years later, this Court affirmed Tinker in Healy v. James, but specified that "requirements of appropriate discipline" and a generalized desire for order cannot be used as a justification to suppress speech simply because the speech is expressed by students on college campuses. 408 U.S. at 180 ("[T]he precedents of this Court leave no room for the view that . . . First Amendment protections should apply with less force on college campuses than in the community at large."). By contrast, this Court wrote, open speech and debate on college campuses should be encouraged in order to foster academic freedom and free exchange in the "marketplace of ideas." Id.

The State can only justify curtailing the First Amendment rights of protestors, thereby ending the protest, amidst the threat of imminent or active violence. Beckerman, 664 F.2d at 510. In such instances, the State is allowed to "disperse and control the crowd," and if that becomes impossible, protesters may be arrested. Id. See also Rusfeldt v. City of New York, No. 22-CV-594, 2024 WL 4354874 at *1 (S.D.N.Y. Sept. 30, 2024) (finding that "provocations to immediate violence" may change police officers' "calculus" in deciding whether to intervene in speech activity). In instances in which violence is just a possibility, rather than ongoing, there are several less speech-restrictive alternatives that officers are encouraged to use to maintain public safety before they resort to affirmatively limiting the protesters' rights, including requiring that protesters step back, calling

for more officers, erecting a free speech barricade, and warning protesters that physical altercations will result in arrest. Meinecke, 99 F.4th at 525.

As the above factors indicate, curtailing the speech of protesters is a last-resort option and should only be undertaken if the threat of violence is imminent or immediate. Beckerman, 664 F.2d at 510. The existence of a hostile audience alone "has never been sufficient to sustain a denial of or punishment for the exercise of First Amendment rights." Id. Neither shouting, cursing, the use of sound amplification devices, nor generally "unruly behavior" constitute danger for the purposes of justifying "governmental restriction of protected speech." Sabel v. Stynchcombe, 746 F.2d 728, 730 (11th Cir. 1984) (citing Cox v. Louisiana, 379 U.S. 536 (1965)).

Although property was damaged in the hour after Petitioner left, Petitioner never alleges that violence occurred while she was trying to speak or that she was physically threatened. R. at 6a; Beckerman, 664 F.2d at 510. At no point did the protesters' behavior "exceed the bounds of persuasion and argument and enter the realm of incitement to imminent lawless action," where punishment might have been justified. Id. (citing Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)).

While the University's viewpoint-neutral policy forecloses discipline of students absent imminent or immediate violence, Petitioner retains alternative private causes of action to redress her inability to speak, such as tort claims or civil rights actions against the disruptive protesters. While the government may not infringe on any speaker's First Amendment rights, a private actor is free to "joust[]

in the speech marketplace," and suffer any potential legal consequences if an opposing private party does not like the results. McGuire, 386 F.3d at 60.

CONCLUSION

For the foregoing reasons, the Court should affirm the Thirteenth Circuit's decisions to (a) find that the University's renewed motion for summary judgment as a matter of law was timely, and (b) deny Petitioner's cause of action against the University for a violation of her First Amendment rights. The University did not violate Petitioner's First Amendment rights when it applied its viewpoint-neutral stance and did not prevent private protesters from disrupting Petitioner's speech. The First Amendment protects speakers and protesters, both of whom have valid rights in and access to the marketplace of ideas.